

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

3. In that decision, the family court found that M.N., a thirteen-year-old girl, had been sexually abused by her adoptive father who had been the petitioner's husband for ten years. In spite of testimony presented by the father from school personnel at two of her prior schools that M.N. had a

reputation for telling lies and causing trouble, the Court found his denials to lack credibility and credited instead the testimony of M.N. on this issue. With regard to the petitioner's role in the abuse, the Court made the following findings:

- a. Four or five years ago, there was an incident where [her husband] assaulted [the petitioner]. MN was in the fifth grade at the time. [Her husband] held [the petitioner] down and held a knife to her throat. He then fled to Canada, taking the children with him. MN witnessed the incident and called the police. [The petitioner] picked the children up in Newport, Vermont within twenty-four hours after the incident. As a result of the incident, [her husband] was convicted of simple assault and unlawful trespass. After the incident, the couple separated for approximately six months and then reconciled. Since the reconciliation, there have been no further incidents involving physical violence between the couple. [The petitioner] testified that [her husband] drinks and perhaps smokes a little marijuana, but that he does not have a drinking problem. She testified that they do fight, but only verbally. As recently as April of 1992, [her husband] came home drunk and was violent to the point where he broke a candle in half. He did not touch [the petitioner] during his rage.
- b. [Petitioner] does not trust [her husband], especially with money. She knows he has lied in the past and does not know if he is lying about the allegations in this case.
- c. Prior to the incident, [petitioner] worked weekends, including nights, at Washington County Mental Health.

- d. From November of 1980 until May of 1991, [petitioner] worked at Rowan Court. She has been unemployed since and receives worker's compensation benefits. She has a medical condition which is exacerbated by stress. She spends some days in bed, some days up and around the house. She does not lead an active life outside her home.
- e. [The petitioner] testified that she is not afraid of [her husband] 99% of the time. . .
- f. During the winter of 1991 and spring of 1992, MN was socially involved with two young men. Her parents did not approve of her being around these young men because they were a few years older than she was . . . Her parents made it known that they did not approve of her involvement with the two young men, and this angered MN.
- g. MN believes that her parents are strict with her. They have placed limits on her in terms of staying overnight at friend's houses and imposing an early curfew on her. [The petitioner] testified that she does not make the children do chores because it is too much of an argument to make them do the chores.
- h. On July 30, 1992, [petitioner] found a condom in [her husband's] wallet along with a Lague Inn matchbook with a phone number on it. She had a tubal ligation and did not believe there was any good reason why [her husband] should have a condom in his possession. She confronted [her husband] with it, and [her husband] said it was not his and he did not know where it came from. Then he said he had found it in MN's room, put it in his wallet, and forgot about it. . .
- i. On that same July 30, 1992, [petitioner] confronted MN with the condom when she came home. MN said she had not seen the condom before. . .
- j. After MN had told [a friend] that [her father] had been sexually abusing her, [her friend] called [the petitioner] and told her that she thought MN had something to tell her. [The petitioner] found MN

at [an aunt's house]. [The petitioner] put MN in the car and took her to [the petitioner's mother's house]. [The petitioner] asked MN if anything had happened. MN was upset. [The petitioner] then asked her sister to talk with MN.

- k. The [petitioner] took MN to the police station at about 7:30 p.m. [The police officer] then interviewed MN. [The petitioner] also spoke to [the police officer]. She did not know whether she should believe MN or [her husband].
- l. On July 31, 1992, MN was interviewed at Our House, a facility set up to allow interviews to be conducted with children who have allegedly been sexually abused . . . During the interview, [the petitioner] spoke with . . . an employee of Our House, and [an investigator] from SRS. She told them that she did not know who (MN or [her husband]) to believe and that both of them had lied in the past.
- m. Later that day, [the petitioner] obtained a temporary restraining order against [the petitioner's husband], who went to live with [the petitioner's] mother. MN continued to reside with [the petitioner].
- n. While the restraining order was in effect, MN heard her mother talking on the phone to [her husband]. MN heard her mother say to [her husband] something to the effect of "a 'tittytwister', don't let your friends hear that or it will get back to SRS."
- o. [The petitioner] testified that [her husband] told her that he had given MN a titty twister, but he did not tell her what age MN was when he did it.
- p. MN testified that when she lived on School Street . . . her aunt was babysitting while [the petitioner and her husband] went out. MN had fallen asleep on her parents' bed and her husband was in her bed. [Her father] came home drunk and took [MN] into her bedroom, where he placed her on a sleeping bag on the floor and fondled her

breasts. [MN] testified that [the petitioner] walked in and asked [her husband] what he was doing. [The petitioner said he was not doing anything. [The petitioner] and [her husband] both deny the incident.

- q. MN testified that the last time [her father] touched her before her disclosure was on July 27, 1992 . . . in her room. She stated that her mother was home, but was sick that day.
- r. [The petitioner] does not know who to believe and she wants both MN and [her husband] to take a polygraph test. She wants both of them away from her. She says she is stressed enough to get a divorce.
- s. MN testified that she did not say anything about what [the petitioner] had done to her because she was afraid of [her father]. She also stated that she had seen her parents fight and did not want to cause them to fight.
- t. During the testimony of MN, [the petitioner] stormed out of the courtroom.

4. The Court did not find that the petitioner was untruthful in her testimony. Nor did the Court find that the petitioner was or should have been aware that her daughter was being abused. Neither did the Court find that the petitioner colluded with her husband to hide the abuse.

5. In its "conclusion of law" section the Court made a legal, not factual finding, that under the definitions in the CHINS statute, the petitioner had not "neglected" her daughter but by her own admission and actions was currently psychologically incapable of enduring the stress of living

with her daughter and facing the reality of the molestation thus making it detrimental to the child's welfare to continue the child in her mother's custody.

ORDER

The petitioner's request to expunge the substantiation of "risk of harm" is granted.

REASONS

When SRS places a person's name in a central registry as a person who placed a child at "risk of harm", that person may apply to the Human Services Board for an order expunging the record because the facts relied upon (1) are not accurate or (2) because a reasonable person could not conclude that the facts amounted to abuse as that term is defined in the registry statute. 33 V.S.A. 4916(h).

The Board is usually required to find facts following a hearing conducted under certain evidentiary rules. See Fair Hearing Rules 11, 12 and 15. However, it is a well-settled rule in this state that a tribunal is precluded from re-litigating factual issues which have already been decided in another tribunal provided certain criteria are met. The criteria established by the Vermont Supreme Court are as follows:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
- (2) the issue was resolved by a final judgment on the merits;
- (3) the issue is the same as the one raised in the later action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc.
155 Vt. 259, 265 (1990)

DCF asserts that all of the conditions necessary for issue preclusion are present in this matter. It has also made it clear in its motion that the petitioner was placed in the registry because of the facts found by this Court.

The petitioner does not argue that the factual findings of the Court are wrong or that it is unfair to use those facts. Her argument is that DCF is wrong to find that those facts constitute "risk of harm." As the parties agree that these are the operative facts, there is no dispute to resolve with regard to the first element of DCF's burden, proving the accuracy of the facts. Thus DCF's motion to use the facts found by the court should be granted.

The second burden of DCF is to show that the facts found fit the definition in the statute. It is the function of the

Board, not the family court, to interpret the meaning of the term "abused or neglected child" found in the registry statute, K.G. v. Dept. of Social and Rehabilitation Services, Docket No. 99-346 (June, 2000). The Board must draw its own conclusions about whether the facts presented in any matter before it justify inclusion in the registry. A finding by a Court that a fact meets the definition of abuse in a criminal or juvenile law standard does not mean that it will meet the standard set forth in a registry statute. Once an expungement request is received, the Board must carry out its duty of making this determination.

The statute at issue defines protected children as follows:

- (2) An "abused or neglected" child means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

- (3) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, emotional maltreatment or sexual abuse.

. . .

- (4) "Emotional maltreatment" means a pattern of malicious behavior which results in impaired psychological growth and development.

33 V.S.A. § 4912

The facts in this case do not support a legal conclusion that the child was ever placed at a substantial risk of harm by the acts or omissions of her mother. There was no finding by the Court that the petitioner knew or should have known her child was being sexually molested before the child told her this was occurring. When the child revealed to her mother that her father had sexually abused her, the mother protected her by immediately reporting the allegation to the police and to SRS. She further obtained a restraining order requiring the child's father to move out of the house the next day.

DCF appears to have concluded that the petitioner placed her child at risk because the court ruled that it would be "detrimental" to the well-being of her child to stay in her custody. DCF equates "detrimental" in the CHINS statute with "risk of harm" in its registry statute.¹ However, it is

¹ DCF's review indicated that the child had been taken from the petitioner's custody because the petitioner "failed to believe her daughter's accusations." The Court did not make that finding but rather found that the petitioner "did not know whether to believe MN or not.". The Court's reason for removing the child from the mother's custody were more complex than DCF describes and had much to do with the mother's own admission that she could not cope with the psychological demands of the

clear from reading the facts that the court did not remove the child from the petitioner's care because she had placed the child in harm's way, the standard contemplated by the registry. Rather the court made it clear that the child was removed because the mother had bluntly communicated through her actions and words that her own trauma made her psychologically incapable of meeting the needs of her child at present. The petitioner's honesty, far from placing the child at risk of harm, allowed the court to take actions placing the child in a safe environment where her trauma could be dealt with by more capable persons.

The registry was intended to protect children by placing in it the names of parents or guardians who place children at risk of harm. There are no facts found by the family court that support a substantiation that this parent created a significant danger of serious harm to her child "likely to cause physical injury, neglect, emotional maltreatment or sexual abuse." The registry was never intended to contain the names of parents who seek help for their children and ask that they be placed away from them during times of physical

situation. Another reason given by DCF for placing her in the registry was that the "concerns" that resulted in the substantiation had "persisted for a number of years." [Commissioner's review letter dated May 13, 2004.] Again, there is no support for this assertion in the Court's findings.

or psychological incapacity in order to avoid a harmful situation. It is important to note in this regard that the petitioner came to SRS to report the abuse of her daughter, not the reverse. The petitioner's request to expunge the finding should be granted.

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